Supreme Court, U. S.
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MICHAEL RODAK JR., CLERK

No. 79-1977

IN THE

Supreme Court of the United States

October Term, 1979

SRECKO BARULEC,

Petitioner,

—against—

OVE SKOU, R. A.,

Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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Questions Presented for Review

1. Were the procedural requirements for assignment under section 33(b) of the Longshoremen's and Harborworkers' Compensation Act (LHWCA) satisfied in this case?

2. Has the particular conflict-of-interest exception to section 33(b) of the LHWCA, as announced by this Court in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956), been removed by subsequent Congressional amendments to the LHWCA?

3. Is the conflict-of-interest exception to section 33(b), if any, limited to demonstrated conflicts of interest?

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Citations to the Opinions and Judgments Delivered in the Courts Below

The decision of the Court of Appeals in *Rodriguez* v. *Compass Shipping Co., Ltd.*, is reported at 617 F.2d 955 (2d Cir. 1980). The decision of the Court of Appeals in *Barulec* v. *Ove Skou, R.A.* is included as Appendix C in the Petitioner's Supplemental Appendix to the Petition for Writ of Certiorari. The opinion of the United States District Court for the Southern District of New York in *Barulec* v. *Ove Skou, R.A.*, is reported at 471 F. Supp. 358 (S.D. N.Y. 1979) and the opinion and decision on defendant's renewed motion to dismiss is contained in the Appendix to this Brief in Opposition.

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Statutes Involved

In addition to section 33(b) of the LHWCA, which is quoted at page 4 of the Petition for a Writ of Certiorari, 20 C.F.R. §§ 702.311-.315 (1976) are involved in this action. As noted by the Second Circuit, these regulations were amended on September 9, 1977, after all relevant events in this lawsuit (9b).*

Statement of the Case

This action was commenced by the filing of a Complaint in the United States District Court for the Southern District of New York on February 22, 1978. Petitioner sought

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* Numbers with letters following, refer to pages in the respective appendices to the Petition for a Writ of Certiorari.

to recover damages for injuries allegedly sustained on January 6, 1975, while working as a longshoreman in the employ of Universal Maritime Service Corp.

Petitioner filed a claim for all benefits to which he was entitled under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA) for the injuries allegedly sustained on January 6, 1975. Compensation was paid voluntarily by the employer's insurer from January 10, 1975 until March 14, 1975. On March 25, 1975, a claim for additional compensation was made by the petitioner's compensation representative and a conference in the matter was requested at that time, as well as in later letters of August 18, 1975 and December 22, 1975.

Pursuant to these requests, a conference was held on February 11, 1976 before the United States Department of Labor, Office of Workers' Compensation Programs, at which time a settlement of the claim was reached. This conference was convened, pursuant to administrative regulations, by a claims examiner and was attended by the Petitioner, his representative, the compensation insurer's representative and the claims examiner. The agreement reached at the conference was memorialized in a Memorandum of Informal Conference dated February 11, 1976. Payment of compensation in accordance with this Memorandum was made by the compensation insurance company and notice of this payment was given to the United States Department of Labor on February 13, 1976.

Petitioner does not dispute that he accepted compensation under the Memorandum dated February 11, 1976, more than one year after the date of the claimed accident, and did not commence suit in this matter until February 22, 1978, more than two years after the date of the award and more than three years after the date of the accident.

Defendant moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment dismissing the complaint of the plaintiff. This motion was denied without prejudice to renewal after 45 days, to allow the Petitioner to present evidence of an actual conflict of interest between the employer's insurer and the Petitioner. The motion for summary judgment was renewed and upon plaintiff's failure to present evidence tending to show that a conflict of interest existed, the Court, by endorsement, granted the motion. On appeal, the United States Court of Appeals for the Second Circuit affirmed the judgment of the District Court for the reasons stated in the case, *Rodriguez* v. *Compass Shipping Co., Ltd.,* 617 F.2d 955 (2d Cir. 1980).

Reasons for Denying the Petition for a Writ of Certiorari

Petitioner asserts that a writ of certiorari should be granted because of a conflict between the Circuit Courts, a conflict between *Rodriguez* and the decision in *Czaplicki* v. *The Hoegh Silvercloud,* 351 U.S. 525 (1956), and a conflict between *Rodriguez* and the purposes of the Act.* It is submitted that such conflicts either do not exist or are of such minimal importance as not to require review by this Court.

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* Almost as an afterthought, petitioner also contends, at page 18 of the petition, that the Second Circuit misconstrued the applicable administrative regulations. Petitioner, however, confuses the regulations which were in effect when Petitioner's compensation claim was resolved with regulations which did not take effect until September 9, 1977 (4b-5b, 9b-11b). Indeed, the limited time frame within which the applicable regulations were in effect, *viz.* 1972-1977, is a further reason for this Court to deny the Petition. The Second Circuit noted that the new regulations were not before it for review and expressly declined to determine the effect of these new regulations (9b n.1, 10b n.2).

In *Czaplicki,* this Court succinctly summarized its holding as follows:

> "Since an action by Travelers would, in effect, be an action against itself, Czaplicki is the only person with sufficient adverse interest to bring suit. *In this circumstance,* we think the statute should be construed to allow Czaplicki to enforce, in his own name, the rights of action that were his originally." 351 U.S. at 531 [emphasis supplied]

Travelers was the workmen's compensation insurer for Northern Dock Company, the employer of Czaplicki, as well as the insurer of Hamilton Marine Contracting Company which, along with the vessel owner and operator, had been sued by Czaplicki in a third party action brought under the LHWCA. By reason of the statutory assignment provided in the LHWCA, 33 U.S.C. §933(b), Travelers was also the proper statutory party to bring suit on behalf of Czaplicki. Because Travelers insured Hamilton Marine Contracting Company, one of the third parties subject to suit both by the plaintiff, under traditional negligence principles, and by the owner and operator of the vessel, pursuant to *Ryan Stevedoring Co.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956), this Court concluded that Czaplicki's rights of action "were held by the party most likely to suffer were the rights of action to be successfully enforced." 351 U.S. at 530. This Court held that the section 33(b) assignment would be precluded only where the statutory assignee would, by pressing the assignor's claim, subject itself to suit either under traditional negligence principles or pursuant to the indemnity doctrine announced in *Ryan Stevedoring Co., supra.* 351 U.S. at 530-33; *Sabol* v. *Merritt, Chapman & Scott Corp.,* 241 F.2d 765 (2d Cir. 1957). As the *Czaplicki* Court explained:

> "Czaplicki can bring this suit not because there has been no assignment, but *because in the peculiar facts here* there is no other procedure by which he can secure his statutory share in the proceeds, if any, of his right of action." 351 U.S. at 532-33 [emphasis supplied]

Following this reasoning, the Courts of Appeals in *McClendon* v. *Charente S.S. Co.*, 348 F.2d 298 (5th Cir. 1965), *Potomac Electric Power Co. (PEPCO)* v. *Wynn*, 343 F.2d 295 (D.C. Cir. 1965) (per curiam) and *Johnson* v. *Sword Line, Inc.*, 257 F.2d 541 (3rd Cir. 1958), essentially held that in the common situation where the assignee would be subject to an indemnity suit under *Ryan, supra*, a presumption of a conflict of interest would arise. The Courts explained that there were essentially two possible reasons for the employer's inaction. First, fear that indemnity under *Ryan* would be sought in an amount far greater than the workmen's compensation liability, or a good faith belief that plaintiff's cause of action was not meritorious. Because of the difficulty in proving which of these motives prevailed and following the rationale of *Czaplicki*, these Courts held that the spectre of an indemnity suit against the assignee was sufficient to find a conflict of interest, which together with inaction, would allow the assignor to proceed with the third party suit in his own name.

As a result of the 1972 Amendments to the LHWCA, the most common ground for a finding of conflict of interest prior to the amendments was abolished. Thus, among other things, Congress legislatively overruled *Ryan Stevedoring Co., supra*, by enacting section 5(b) of the LHWCA, 33 U.S.C. §905(b). This section, in pertinent part, reads as follows:

> "In the event of injury to a person covered under this Act caused by the negligence of a vessel, then such

> person, . . . may bring an action against such vessel as a third party in accordance with the provisions of Section 33 of this Act, and the employer shall not be liable to the vessel for such damages directly or indirectly and any agreements or warranties to the contrary shall be void . . . ."

This section has had two significant effects on the issues presented in the Petition for a Writ of Certiorari. First, and perhaps most importantly, Congress reaffirmed that any actions against vessels as third parties must be brought "in accordance with the provisions of Section 33." Among the provisions of Section 33 is, of course, the second subsection, which provides for the assignment of a cause of action six months after the payment of compensation under an award in a compensation order. Thus, Congress in 1972, reaffirmed its consistent policy determination that third party causes of action should be assigned to the employer six months after the acceptance of compensation under an award in a compensation order. As was recently held by this Court in *Mobil Oil Corp.* v. *Higginbotham*, 436 U.S. 618 (1978), a decision involving a Congressional policy determination under the Death on the High Seas Act, Congress' choice must be given proper deference by the judiciary in applying legislation.

The second significant effect that this provision has had is the removal of the conflict of interest normally found between a stevedore and its employee with regard to third party suits against a vessel. It was the *Ryan* indemnity suit which *Czaplicki* and its progeny cited as justification for the avoidance of the plain words of the statute. It is this very same indemnity suit which section 5(b) has done away with, *see Edmonds* v. *Compagnie Generale Transatlantique*, 443 U.S. 256 (1979). Without such a

conflict of interest, the Second Circuit's rationale in *Rodriguez* is entirely correct and, in fact, in full accordance with this Court's rationale in *Czaplicki* as well as the rationales put forth by the Circuit Courts in *Johnson, supra, PEPCO, supra,* and *McClendon, supra.*

The only case with which an arguable conflict may exist is *Caldwell* v. *Ogden Sea Transport Inc.,* Dkt. No. 78-1257 (4th Cir. March 27, 1980). The Fourth Circuit, in part, held that following the expiration of the six-month period after an award, a cause of action will "revest" in the longshoremen if the statutory assignee, for whatever reason, declines to bring suit. Of course, under *Rodriguez,* the statutory assignment will only be avoided when, as in *Czaplicki, supra,* an actual conflict of interest exists.

The difference between these two opinions, however, is more cosmetic than real. Neither decision extinguishes the negligence liability of a vessel under the Act. Both decisions agree that the statutory requirement of an "award in a compensation order" may be satisfied by informal, as well as formal, actions, citing *Toomey* v. *Waterman S.S. Corp.,* 123 F.2d 718 (2d Cir. 1941) and *Liberty Mutual Ins. Co.* v. *Ameta & Co.,* 564 F.2d 1097 (4th Cir. 1977). And both decisions recognize that section 33(b) permits one party, either the longshoreman or the employer, to enforce the vessel's negligence liability. *Rodriguez* only requires the longshoreman to decide within six months *after an award* whether to commence suit against a vessel. Thereafter, the decision whether to commence suit and the control of the lawsuit is, in accordance with section 33(b), given to the employer or the employer's workmen's compensation insurer. Unless an actual conflict of interest is proven, the employer or the employer's insurer is then permitted to weigh the merits of the case to determine whether there was negli-

gence, of the vessel which was a substantial factor in causing the longshoreman's claimed injury.

Notably, in this case the award was not filed until more than a year after the accident and, therefore, petitioner's time to commence a lawsuit under section 33(b) did not expire until more than 18 months after the accident. It was thereafter the employer's insurer's prerogative to commence a lawsuit. It is anticipated that as a result of both the *Rodriguez* and *Caldwell* decisions, actions in both Circuits will only be commenced in a more timely fashion.

Petitioner finally asserts that the decision in *Rodriguez* conflicts with the Congressional intent to do away with indemnity from the stevedore to the shipowner, to husband the stevedore's resources, and to establish negligence liability for the shipowner.

As already noted above, neither *Rodriguez* nor *Caldwell* extinguish the negligence liability of the vessel. So too, neither opinion has anything whatsoever to do with requiring indemnity from a stevedore to a vessel. In 1972, Congress did intend to conserve resources, but it intended to do so as to the resources of all parties, including vessels*, so that the vast improvement in compensation benefits effected by the amendments could be financed by these savings. S. Rep. No. 1125, 92d Cong., 2d Sess. 9 (1972). Congress envisioned the restriction of third party litigation under the LHWCA as the means to accomplish this savings. *Id.* Thus, the longshoreman's remedies were broadened in compensation but restricted in third party litigation under the 1972 amendments.

It would seem that petitioner's real concern is that review by employers and workmen's compensation insur-

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* It is the vessel's resources which are ultimately taxed by the LHWCA since the stevedore's compensation costs are passed on to customers in the stevedore's rates.

ers may reduce the number of lawsuits commenced as a result of longshoremen's accidents. Should this review assist in the disposition of longshoremen's personal injury suits which lack merit or are of questionable merit, the Congressional intent underlying the 1972 Amendments would be furthered. As the Senate Committee noted with regard to third party suits prior to 1972,

> "The social costs of these lawsuits, the delays, crowding of court calendars and the need to pay for lawyers' services has seldom resulted in a real increase in actual benefits for injured workers." S. Rep. No. 1125, 92d Cong., 2d Sess. 4 (1972).

Clearly, in 1972 Congress made an important policy determination that longshoremen's remedies should be more closely covered by workmen's compensation benefits rather than by burdensome and ultimately ineffective litigation*. Such a restriction is intended to place the cost of accidents on employers except in those situations where a vessel's negligence substantially contributed to the happening of the accident. This restriction of litigation was in turn intended to husband the resources of both shipowner and stevedore to finance the vast improvement in compensation benefits provided by the amendments.

The decision in *Rodriguez* does not, therefore, conflict with this Court's decision in *Czaplicki,* nor with the Congressional purposes underlying the enactment of the 1972 amendments to the LHWCA. The Second Circuit's analysis and conclusion is also in accord with the vast majority of decisions which have been rendered on this subject.

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*Of course, petitioner's suggestion that the vessel's proper remedy would be to join the employer under F.R.Civ.P. 17(a) would only cause additional litigation and thus defeat the expressed intent of Congress in enacting the 1972 Amendments.

Under all decisions on this subject, including *Rodriguez,* the negligence liability of a vessel is not extinguished. *Rodriguez* simply follows Congress' policy determination that, absent an actual conflict of interest, third party actions are assigned to the employer or the employer's insurer six months after receipt of compensation under an award.

CONCLUSION

For the foregoing reasons, respondent respectfully submits that a Writ of Certiorari should not issue to review the decision below.

Respectfully submitted,

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APPENDIX

Endorsement

SRECKO BARULEC, *Plaintiff*, v. OVE SKOU, R.A., *Defendant*.

78 Civ. 786

LASKER, D.J.

By Memorandum Opinion dated May 31, 1979, the plaintiff in this action was given forty-five days within which to submit competent evidence establishing a conflict between his interests and those of his employer sufficient to bring his case within the exception to the mandate of 33 U.S.C. § 933(b) created in *Czaplicki* v. *The Hoegh Silvercloud*, 351 U.S. 525 (1956). The defendant was given leave to renew its motion for summary judgment dismissing this action on the grounds that the plaintiff's cause of action has been assigned to his employer pursuant to section 933(b) after forty-five days.

Plaintiff did not submit any evidence within the allotted forty-five days, and the defendant now renews its motion. In opposition, plaintiff still has not submitted any evidence tending to show that a real conflict of interest exists, but seeks instead to reargue the issues disposed of on defendant's prior motion. Plaintiff is not entitled to a "second bite of the apple," and should address its arguments to the Court of Appeals.

Accordingly, for the reasons stated in our opinion of May 31, 1979 in this case and in our opinion in *Perez* v. *Arya National Shipping Line, Ltd.*, 468 F.Supp. 799 (S.D.N.Y. 1979), the defendant's motion for summary judgment dismissing this action is granted.

It is so ordered.

Dated: New York, New York
August 8, 1979

MORRIS E. LASKER
U.S.D.J.